

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
) Case No. 4:19-cv-00415
ALEXANDRU BITTNER,)
Defendant.)
)

**UNITED STATES' REPLY TO DEFENDANT'S RESPONSE TO ITS MOTION TO
STRIKE THE EXPERT TESTIMONY AND REPORT OF SCOTT D. MICHEL**

The United States files this its reply in support of its Motion to Strike the Expert Testimony and Report of Scott D. Michel, and states as follows:

The United States objected to, and moved the Court to strike, the expert testimony and report of Defendant's expert Scott D. Michel, ("Michel") because his proposed expert testimony consisted of nothing more than legal conclusions that invade the role of the Court.¹

Defendant responds that Michel is to testify about the factual manner of Mr. Bittner's case to determine whether the IRS's FBAR penalty assessments violated IRS practice and procedures.² According to the defendant, Michel is going to rely on the IRM, Regulations and case law to opine on "(1) whether the IRS the has complied with its published procedures in administering this penalty"....

³ This is exactly the Court's role and why his testimony should be struck.

¹ See ECF #20, filed February 11, 2020.

² See ECF #21, Defendant's response at pg. 2. Defendant's response, ECF #21, was filed on March 2, 2020.

³ See ECF #21, Defendant's response at pg. 6.

With regard to the defendant's argument for comparing other taxpayer's cases, it is the Court's role to review the agency's record to ensure that the agency engaged in reasoned decision-making and that there was a rational connection between the *facts of this case* and the choice made regarding the amount of the penalty. *See, United States v. Williams*, No. 1:09-CV-00437, 2014 WL 3746497, at *1 (E.D. Va. June 26, 2014. The record to be reviewed consists of the facts and evidence pertaining to Mr. Bittner's conduct, and the Court must decide whether, based on that record, the IRS's decision, as an agency, followed the law and was rational based on the facts and circumstances of Mr. Bittner's case. The answers to these questions are for the Court's determination (trier of fact) -- not Mr. Michel's.

The United States requests that the Court strike the report and testimony of proposed expert witness Scott D. Michel in this case.

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ Herbert W. Linder
HERBERT W. LINDEM
Ohio Bar No. 0065446
Attorney, Tax Division
U.S. Department of Justice
717 N. Harwood St., Suite 400
Dallas, Texas 75201
Phone: (214) 880-9754
Fax (214) 880-9741
herbert.w.linder@usdoj.gov

ATTORNEYS FOR UNITED STATES

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply has been made on March 9, 2020, by the Clerk's ECF filing system to:

CLARK HILL STRASBURGER
Farley P. Katz
Rachael Rubenstein
2301 Broadway St.
San Antonio, Texas 78209

/s/ Herbert W. Linder
HERBERT W. LINDER